

MOUNT GRACE FARM (PVT) LTD
versus
JUMUA METALS & MINERALS (PVT) LTD
and
MINISTER OF MINES AND MINING DEVELOPMENT

HIGH COURT OF ZIMBABWE
ZISENGWE J
HARARE, 19 November 2019 & 8 January 2020

Opposed Matter

T. Pfigu for the applicant
S. Evans, for the respondent

ZISENGWE J: This is a dispute over the 1st respondent's exercise of mining rights conferred to it by the 2nd respondent through a special grant to mine gold. That special grant was issued by 2nd respondent in terms of s 291 of the Mines and Minerals Act, [*Chapter 21:05*] (the Act) and gives 1st respondent certain mining rights on a portion of the property owned by the applicant. The property in question is a farm going by the name Mount Grace Subdivision 23 of Welston Glenforest (Goromonzi District) (hereinafter referred to as the farm).

In its papers filed of record, the applicant raises a number of complaints regarding alleged transgressions perpetrated by the 1st respondent in the exercise of the aforesaid rights. It therefore seeks an interdict against the 1st respondent wherein the respondent (and all those claiming through it) are not only ordered to immediately cease all mining operations on the farm, but to also immediately vacate the same.

The applicant avers that it is entitled to the interdict it seeks as all the requirements justifying the granting of same are satisfied. It claims that it has a clear right against the 1st respondent in that the latter neither sought nor obtained written consent from it (i.e. applicant) before the commencement of the exercise of its rights under the special grant as required by s 31

of the Act. It was averred in this regard that the said section makes it mandatory for the holder of a special grant to obtain such written consent in circumstances where the size of property is less than 100 hectares in extent. The farm in question falls into this category.

As far as the requirement for injury actually suffered or reasonably apprehended is concerned, the applicant avers that the 1st respondents' mining activities have been environmentally catastrophic on the farm. Although it did not say so in terms, the applicant alleges amongst an array of complaints, that the pits, trenches and gullies excavated by the 1st respondent are a death trap to its livestock on the farm to the extent that the viability of its once vibrant goat project is under threat. Applicant further avers those excavations pose a clear and present danger to inhabitants of the farm as well.

Applicant also complains of incessant and excessive noise generated by 1st respondent's blasting and mining activities. Finally applicant avers that its arable land has been rendered virtually inarable, on account of the excavations and trenching attendant to 1st respondents' mining activities.

Applicant finally avers that no other remedy is available to it other than to bring this current application.

The 1st respondent opposes this application and disputes practically each of the applicant's averments. It contends that applicant has no clear right recognised at law. In its papers 1st respondent skirts the provisions of s 31 of the Act, referring the court instead to s 38. It was however contended in the oral submissions in court that s31 of the Act is inapplicable and does not avail the applicant. This is, so the argument goes, because that section specifically applies to holders of special *prospecting* licences/grants yet the 1st respondent is the holder of what it termed a "special *mining* grant".

It is also contended that s 38(7) of the Act merely requires the holder of a special grant to give notice of its intention to carry out activities mandated in the grant and further that in any event, the failure to give such notice does not render such activities invalid.

Regarding the issue of injury suffered or reasonably apprehended by the applicant, the 1st respondent contends that applicant's affidavit contains material falsehoods calculated to mislead the court. In particular the 1st respondent completely denies ever having caused any environmental degradation on applicant's farm not least because it is yet to commence any

mining activities thereon. Further, it denies that its operations pose a hazard to applicant, its employees, and livestock or any of its farming activities. It further avers that the application is actuated by malice as applicant is aggrieved by a criminal case which it (i.e. 1st respondent) opened against some of the agents of the applicant which criminal matter is still pending before the courts. That criminal relates to allegations that applicant (supposedly through its employees) destroyed a container and mining equipment belonging to the 1st respondent.

Regarding the availability of other suitable remedies, it is 1st respondent's position that the applicant has another medium of redress by virtue of s 32 of the Act.

It is that what the applicant seeks in this case is a final interdict and it is trite that for such an application to succeed the following must be established by the applicant:-

- (a) That he has a clear right clearly established in law
- (b) That he has either suffered actual injury or has a reasonable apprehension of injury
- (c) That there is no other ordinary remedy by which he or she can be protected in the same way as by an interdict (see *Setlogelo vs Setlogelo* 1914 AD 221, *Flame Lily Investment Company (Private) Limited v Zimbabwe Salvage (Private) Limited and Another* 1980 ZLR 378.

Each of these as they apply to the current dispute will be dealt with in turn.

Whether or not applicant has a clear right established at law

Central to the resolution of the question is an interpretation of s 31 of the Act and more importantly whether s 31 is applicable to special grants the species of which the 1st respondent is in possession of. Section 31(1) of the Act spells out limitations regarding the exercise of rights conferred to a holder by virtue of a "*prospecting license or any special grant to carry out prospecting operations or any exclusive prospecting order*". More pertinently for current purposes it provides in s 31(g) that no such rights shall be exercised "*except with the consent in writing of the owner or of some person duly authorized thereto by the owner upon any holding of land which does not exceed one hundred hectares in extent and which is held by such owner under one separate title...*"

It is common cause that the applicant's land is less than one hundred hectares in extent (it is about 89 hectares in size). The 1st respondent however bases its argument on the fact that s 31

specifically refers to “prospecting licences” and in the opinion of its counsel, it is inapplicable to “special mining grants”.

The special grant that 1st respondent has is neither captioned “prospecting” nor “mining”, however its nature can be gleaned from both its contents and from the section under which it was issued. With regard to the former, the special grant states as follows in its preamble – Special Grant No. 6511 “*A special grant is hereby issued for renewal and conversion to Juma Metals (hereunder referred to as the “holder” to carry out mining operations for gold*”. (Emphasis added)

As for the latter, it is clear that the special grant was issued under s 291 of the Act which provides as follows:-

Issue of special grant

291. (1) The Secretary may issue to any person –
- (a) a special grant to carry out prospecting operations, or
 - (b) a special grant to carry out mining operations or any other operations for mining purposes, upon a defined area situated within an area which has been reserved against prospecting or pegging under Section thirty-five for a period which shall be specified.

It is clear from a reading of the above that whereas a special grant issued under s 291 (1) (a) restricts the holder thereof to prospecting only, the holder of a grant under 291(1)(b) is permitted to do both prospecting and mining. This much is clear from the phrase “*mining operations or any other operation for mining operations...*”

Prospecting is almost invariably antecedent and inseparable from mining. The Act does not define the term “prospect” However the term prospect is generally understood to mean to explore an area especially for mineral deposits. It is a process an operation associated with mining. It is therefore clear to that s 31 of the Act is applicable to the holder of a special grant of the type that 1st respondent is in possession of.

Even if one were to take the view that prospecting and mining are separate and distinct, there is merit in the argument advanced on behalf of the applicant that if the prospecting which preceded the mining was conducted without the written consent of the applicant, it has the effect of invalidating the subsequent mining. It is the prospecting grant which led to the granting of the mining grant. If the prospecting (if any) which preceded the current mining activities were

tainted and irregular for want of the mandatory written consent by applicant, it could not give rise to supposedly legitimate mining activities.

In any event to construe the provisions of s 31 of the Act as being applicable to prospecting only and not to mining may bring about absurd results. It may imply, for instance, that the holder of a special “mining” grant is permitted to mine within a few paces of the principal homestead of the land owner, yet being prohibited from “prospecting” within four hundred and fifty metres of such homestead or more pertinently that the holder of a special mining grant may be allowed to mine on a holding of less than 100 hectares in extent without the written consent of the landowner, but is prohibited from prospecting on such land without the written consent of the landowner.

Interestingly 1st respondent conceded in its opposing affidavit that it has not been mining but has only been prospecting. This lends credence to the view that prospecting ordinarily precedes and is inseparable from mining.

For the foregoing reasons, I am of the view that the applicant has demonstrated that it has a clear right bestowed on it in terms of s 31 of the Act either grant or withhold consent for respondent to exercise its rights in terms of the special grant. To hold otherwise amounts to giving the holder of a special grant carte blanche to do as he pleases on property where such rights are to be exercised.

I pause here to point out that where the consent is unreasonably withhold, the holder of the special grant may seek redress in terms of s 31(1)(g)(iii) of the Act (which, of course is not the current dispute).

Injury actually suffered or reasonably apprehended.

The 1st respondent denies causing the environmental degradation complained of by the applicant, not least because its mining operations are yet to commence. Further it avers that it has complied with all the requirements prescribed by the environmental watchdog, the Environmental Management Agency (EMA) and an Environmental Impact Assessment Certificate has been duly issued.

It was also pointed out by the 1st respondent that the gullies, excavations, pits et cetera that the applicant refers to in this application were not caused by it. It indicated that some of the open pits were dug up by illegal miners who invaded the farm and randomly dug them up in

search of minerals. 1st respondent also refers to mining activities which took place prior to obtaining special grant. Whether or not the excavations, pits, shafts or gullies on the farm were caused by the 1st respondent is contested terrain and one cannot conclude that the applicant has managed to prove that it has suffered actual injury caused by 1st respondent.

However, in the absence of its written consent for 1st respondent to commence its activities, there is justification for reasonable apprehension of injury on the part of the applicant. The purpose of s 31 of the Act in general and the requirement for the obtaining of written consent of the owner of the property in circumstances such as the present in particular, is to safeguard the legitimate interests of the land owner.

In Herbstein and Van Winsen's "The Civil Practice of the High Courts and the Supreme Courts of Appeal of South Africa (5th ed)" the following is stated:-

"It is not necessary for the applicant to establish on a balance of probabilities that the injury will occur: he must simply establish on a balance of probabilities that there are grounds for a reasonable apprehension that his rights will be detrimentally affected."

The learned authors proceeded to refer to the cases of *Free Gold Areas Ltd v Merriespruit* (Orange Free State Gold Mining Co. Ltd 1961 (2) SA 505 (W) where the court "rejected the argument that the applicant must show that the action of the respondent is 'reasonably bound to cause damage' and held that 'a reasonable apprehension of injury is one which a reasonable man might entertain on being faced with certain fact.' The test of apprehension is an objective one (see *Ex parte Lipschitz* 1913 CPD 737; *Nestar v Minister of Police* 1984 (4) SA 230 (SWA). The implication being that on the facts presented to it the court is required to decide whether there is any basis for entertainment of a reasonable apprehension by the applicant see *Nestar v Minister of Police* (*supra*)."

In the present matter, prospecting and mining operations are by their very nature intrusive, invasive and sometimes even disruptive on the land (and its inhabitants) on which they are to be carried out. This is particularly so in respect of a relatively small holding such as that of the applicant measuring only 89 hectares in extent. Section 31 of the Act was created for good reason: namely to protect the interests of the land owner vis-à-vis the rights of the grant holder. The apprehension by the applicant of an infringement of his rights in the absence of his consent is reasonable.

Absence of any other ordinary remedy

As far as this third requirement for the granting of an interdict is concerned, the respondent argues *inter alia* that the applicant should have proceeded in terms of s 32 of the Act. The said section provides as follows:

“If any dispute arises between the holder of a prospecting licence or a special grant to prospect or any exclusive prospecting order and a land owner or occupier as to whether land is open to prospecting or not, the matter shall be referred to the Administrative Court for decision.”

In my view this section is only applicable to disputes “as to whether land is open to prospecting or not”. The current dispute concerns the granting of written consent by the land owner coupled with apprehension over land degradation and s 32 is therefore not applicable.

As a matter of fact s 345 of the Act gives the High Court jurisdiction to entertain disputes arising under the Act except in limited situations. The applicant therefore approached the correct forum.

The wording of the order sought is however a different kettle of fish! The order which applicant seeks has the net effect of nullifying the 1st respondent’s special grant in so far as it relates to its (i.e. applicant’s) portion of the land. Applicant seeks an order for the immediate cessation of 1st respondent’s mining activities on and its ejection from the farm. There is a patent discongruence between the conduct complained of (i.e. absence of written consent) and the relief sought (cessation of all mining activities and ejection from the farm). Counsel for the applicant readily conceded as much when I posed this question during the proceedings in court, and indicated that it was amendable to an order in the terms suggested by the court.

Rule 240 of the High Court Rules, 1971 permits a court to make a variation of the order sought. Since the applicant’s main concern is the absence of the written consent and the apprehension of injury attendant thereto, the court will grant an appropriately amended order.

In the final analysis, it is ordered that:-

1. The first respondent and all those claiming title through it be and are hereby ordered to cease all mining operations on Mount Grace Farm Subdivision 23 of Welston

Glenforest (Goromonzi District) within 48 hours until they comply with s 31 and 38 of the Mines and Minerals Act, [*Chapter 21:05*].

2. First respondent to pay costs of application.

T. Pfigu Attorneys, applicant's legal practitioners

Mabuye Zvarevashe-Evans, first respondent's legal practitioners